

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/09/2003

CORAM

THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN
and
THE HONOURABLE MR.JUSTICE T.V.MASILAMANI

A.S.No.1177 of 1986
and
Tr.A.S.No.121 of 2000

A.S.No.1177 of 1986:

1. Saroja
2. Shanmugasundaram
3. Vijayakumar (died)
5. Ponmani
6. Minor Amudhaveni
(Minor appellant represented by guardian, Ponmani)

Appellants 4 to 6 are L.Rs. of the deceased 3rd appellant.
... Appellants.

-Vs-

1. Chennimalai.
2. Sivanmalai.
3. Ramasamy
4. Marayammal.

... Respondents.

Appeal filed against the judgment and decree dated 2.5.1986 in
O.S.No.930 of 1980 on the file of II Addl. Sub Judge, Erode.

Tr.A.S.No.121 of 2000:

1. Ayyasami Pillai.
2. Saroja
3. Shanmughasundaram
4. Vijayakumar (died)
5. Thangammal.
6. Ponmani
7. Minor Amudhaveni (rep. by mother guardian, Ponmani)

Appellants 5 to 7 impleaded as L.Rs. of the deceased 4th appellant. ... Appellants.
vs.

1. Marayammal
2. Chennimalai
3. Sivanmalai
4. Ramasami
5. Pappayammal
6. Pappathi.

... Respondents.

Appeal filed against the judgment and decree dated 2.5.1986 in O.S.No.10 of 1986 on the file of II Addl. Sub Judge, Erode (Originally filed as A.S.No.123 of 1986 before the District Court, Erode which was ordered to be transferred to this Court and numbered as Tr.A.S.No.1 21 of 2000)

In both appeals:

!For appellants :: Mr.S.V.Jayaraman, Sr.counsel for
Mr.T.L.Murugamanickam.

^For respondents :: Mr.V.Raghavachari.

:JUDGMENT

N.V.BALASUBRAMANIAN,J.

The two appeals are directed against the common judgment rendered by the Second Additional Subordinate Judge, Erode in O.S.No.930 of 198 0 and O.S.No.10 of 1986 dated 2.5.1986. A common question that arises in both the appeals is regarding the validity and genuineness of the will dated 28.9.1979 executed by one Muthusami Pillai. Muthusami Pillai had also executed a will dated 15.3.1972 and if the will dated 28.9.1979 is found to be genuine, the rights of the parties would be governed by the terms contained in the later will, and if the will dated 28.9.1979 is found to be not genuine, then the question will arise whether the rights of the parties would be governed by the will dated 15.3.1972. The plaintiffs in O.S.No.930 of 1980 and the defendants in that suit are also parties in the suit in O.S.No.10 of 1986 apart from certain other parties. In the trial Court, both the suits were tried together and the evidence was recorded in O.S.No.930 of 198 0.

2. A.S.No.1177 of 1986 is filed against the judgment and decree in O.S.No.930 of 1980 and Tr.A.S.No.121 of 2000 is filed against the judgment and decree in O.S.No.10 of 1986. O.S.No.930 of 1980 is a suit for partition and O.S.No.10 of 1986 is a suit for declaration of title of the plaintiff in the said suit in plaint A-schedule property and for consequential

injunction.

3. The facts are common in both the appeals and hence, we propose to refer to the pleadings in O.S.No.930 of 1980 for understanding of the issues that arise in both the appeals and the parties are also hereinafter referred to as arrayed in O.S.No.930 of 1980. The suit properties belonged to one Muthusami Pillai and there is no dispute that the suit properties were his absolute properties. Muthusami Pillai had two sons, namely, Chinnappa Pillai and Ayyasami Pillai and Chinnappa Pillai pre-deceased his father Muthusami Pillai. The defendants 1 to 3 in the suit are the sons of Chinnappa Pillai and 4th defendant Marayee Ammal, who has instituted the other suit, is the wife of Chinnappa Pillai and the daughter-in-law of Muthusami Pillai. The plaintiffs are the sons and daughters of the other son, Ayyasami Pillai. According to the plaint, the plaintiffs' grandfather Muthusami Pillai, while he was in a sound disposing state of mind, executed a registered will dated 15.3.1972 by which he has bequeathed the suit properties in favour of the plaintiffs and the defendants 1 to 3 to be enjoyed them equally and absolutely. In the said will, the mother of the plaintiffs, Thangammal was appointed as their guardian during the minority of the plaintiffs 1 to 3 and similarly, Marayee Ammal, the 4th defendant, was appointed as the guardian for the minor 3rd defendant. Muthusami Pillai died on 10.6.1980. According to the plaintiffs, the will dated 15.3.1972 came into effect on the death of Muthusami Pillai and the will dated 15.3.1972 is the only and last will of Muthusami Pillai. In spite of demands made by the plaintiffs, there was no partition of the suit properties and hence, the plaintiffs have come forward with the suit for partition and separate possession.

4. The plaint was subsequently amended by which the fourth defendant was impleaded as a party and an additional paragraph was also inserted in the plaint. In the amended plaint, a reference has been made to the suit filed by Marayee Ammal in O.S.No.1091 of 1980 on the file of District Munsif, Erode (which was later transferred to the Sub Court, Erode and renumbered as O.S.No.10 of 1986) claiming an extent of 0.96 cents described as A-schedule on the basis of the will dated 28.9.1979 (Item No.1 of A-schedule properties in O.S.No.930 of 1980) purported to have been executed by the testator, Muthusami Pillai. The plaintiffs in O.S.No.930 of 1980 have not admitted the execution, genuineness and validity of the will and according to them, the will dated 28.9.1979 is a fabricated document and was obtained by undue influence, coercion and fraud played by the fourth defendant and her sons and hence, the suit has been filed for partition and separate possession on the basis of the will dated 15.3.1972.

5. The defendants in the written statement have admitted the relationship between the parties as set out in the plaint. It is also stated that the properties are separate properties of Muthusami Pillai. It is also averred that Muthusami Pillai had two sons and two daughters and according to the defendants, Muthusami Pillai had cancelled the will dated 15.3.1972 and Chinnappa Pillai, father of the defendants 1 to 3 died twenty years prior to the institution of the suit and thereafter Muthusami Pillai was living with the family of his eldest son. According to them, Muthusami Pillai was personally cultivating his lands and though he was aged 77 years in 1979, he

was hale and healthy and he was active till his death. According to them, he was a shrewd and an intelligent man and while he was in a sound disposing state of mind, he executed the will dated 28.9.1979. According to them, the will dated 28.9.1979 is the last will and testament of Muthusami Pillai which was voluntarily executed and attested by independent witnesses and it was also registered and Muthusami Pillai had cancelled his earlier will dated 15.3.1972 and in the will dated 28.9.1979, the property described in A-schedule of the will was given to the fourth defendant, the widow of his pre-deceased son Chinnappa Pillai and B-schedule properties in the will were bequeathed in favour of the plaintiffs and the defendants 1 to 3 in equal shares. According to them, the parties have taken possession of the respective properties bequeathed in their favour and the parties were aware of the will dated 28.9.1979. In the written statement, the defendants have referred to the suit filed by the fourth defendant, Marayee ammal in O.S.No.1 091 of 1980 on the file of District Munsif, Erode. In this connection, we would like to refer to the plaint in O.S.No.1091 of 1980 on the file of District Munsif, Erode and in that plaint, the plaintiff therein, the fourth defendant in the present suit has admitted that Muthusami Pillai, while in sound disposing state of mind, executed a registered will dated 15.3.1972 bequeathing his properties equally in favour of the children of his sons, Chinnappa Pillai and Ayyasami Pillai and She also referred to the will dated 28.9.1979. Marayee Ammal in her plaint also referred to a notice issued by the plaintiffs in the suit for partition dated 1.7.1980 claiming half share in A and B schedule properties for which a reply dated 22.7.1980 was sent and even before the receipt of the reply on 28.7.1980, the suit for partition was filed on 14.7.1980. Hence, there were two suits, one for partition and another for declaration.

6. The trial Court, on the basis of the pleadings, framed necessary issues for consideration in both the suits and held that the will dated 28.9.1979 is a true and valid will of Muthusami Pillai. The trial Court also held that the will dated 15.3.1972 was validly revoked and the fourth defendant Marayee ammal would be entitled to the relief of declaration in the suit filed by her in O.S.No.10 of 1986 with reference to 0.96 cents, and granted the relief of partition with reference to other properties except 0.96 cents of land for which the relief of declaration has been granted in favour of Marayee ammal. It is, against the judgment and decrees in both the suits, the present appeals have been preferred and Tr.A.S.No.121 of 2000 was filed before the learned District Judge in A.S.No.123 of 1986 and on the basis of the order of this Court, dated 18.9.1987 in C.M.P.No.10709 of 1987, the appeal was transferred and numbered as Tr.A.S.No.121 of 2000.

7. The point that arises in the appeals is whether the will of Muthusami Pillai dated 28.9.1979 is a true and genuine will and if it is not a true and genuine will of Muthusami Pillai, whether the parties would be entitled to claim partition on the basis of the will dated 15.3.1972. We have framed the second point as Mr.V.Raghavachari, learned counsel for the respondents contended that the plaintiffs' suit for partition in any event has to fail as they have not proved the will dated 15.3.1972.

8. It is relevant to mention here that the original will of Muthusami Pillai dated 15.3.1972 was not produced by any of the parties in the

suit and each party blames the other for the non-production of the same on the ground that the other party is having custody of the said original will, but the fact remains that the will of Muthusami Pillai dated 15.3.1972 was not produced before the Court. Though D.W.6 in his evidence has stated that the scribe D.W.5 has taken away the original will dated 15.3.1972, that part of the evidence is not acceptable as nobody would permit a scribe, a third party, to take away the original will executed by a testator. However, the non-production of the original will dated 15.3.1972 does not assume much importance as there is no dispute about that will and further the will was admitted by the defendants.

9. The main point that arises in the appeal is whether the defendants have proved the execution of the will dated 28.9.1979 (Ex.B-6). Section 68 of the Indian Evidence Act, 1872 deals with the proof of execution of a document required by law to be attested and the section, so far as it is relevant for the purpose of this case, reads as under:-
"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

Section 71 of the Evidence Act deals with the cases where attesting witness denies the execution and the section reads as under:-
"If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

10. The question what is meant by attestation of a document was considered by a Full Bench of this Court in *VENKATA SASTRI AND SONS v. RAHILNA BI* (1962) 1 MLJ 78) and this Court held as under:-
"After the amendment of section 3 by Act XXVII of 1926, a person can be said to have validly attested an instrument, if he has actually seen the executant sign, and in a case where he had not personally witnessed execution, if he has received from the executant a personal acknowledgment of his signature, mark, etc. Thus of the two significant requirements of the term "attest", namely, (1) that the attestor should witness the execution, which implies his presence, then, and (2) that he should certify or vouch for the execution by subscribing his name as a witness, which implies a consciousness and an intention to attest, the Amending Act modified only the first: the result is that a person can be an attesting witness, even if he had not witnessed the actual execution, by merely receiving personal acknowledgment from the executant of having executed the document and putting his signature. But the amendment did not affect in any way the necessity for the latter requirement namely, certifying execution which implies that the attesting witness had the animus to attest. The decision of the Privy Council in *Shyam Sundar v. Jagannath* (1927) 54 MLJ 43 (46) (P.C.), establishes that a person can be an attesting witness only if while putting his signature to the document he had the animus to do so"

11. The Supreme Court in *ABDUL JABBAR v. VENKATA SASTRI* (AIR 1969 SC 1147), on appeal, has confirmed the view taken by this Court in *Venkata Sastri's case* (1962) 1 MLJ 78) as regards the meaning of the

expression, 'attested', though the Supreme Court did not agree with the view of this Court when it held that the security bond was not required to be attested by witnesses. As far as the meaning of the expression, 'attested', the Supreme Court held as under:-

"It is to be noticed that the word 'attested', the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under section 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

9. "In every case the Court must be satisfied that the names were written *animo attestandi*", see Jarman on Wills, 8th Ed. p.137. Evidence is admissible to show whether the witness had the intention to attest. "The attesting witnesses must subscribe with the intention that the subscription made should be complete attestation of the will, and evidence is admissible to show whether such was the intention or not", see Theobald on Wills, 12th Ed. p.129. In *Girja Datt v. Gangotri*, AIR 1955 SC 346 (351) the Court held that the two persons who had identified the testator at the time of the registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put "*animo attestandi*". In *Abinash Chandra v. Dasrath Malo*, ILR 56 Cal 598 = (AIR 1929 Cal 123) it was held that a person who had put his name under the word "scribe" was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a "scribe". In *Shiam Sundar Singh v. Jagannath Singh*, 54 Mad LJ 43 = (AIR 1927 PC 248) the Privy Council held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees."

12. The same view was reiterated by the Supreme Court in *KAMALAM, N. (D) & ANR. v. AYYASAMY & ANR.* (2002-1-L.W.460). The Supreme Court in that case, after referring to the meaning of the expression, 'attested' and its earlier decision in *Venkata Sastri's* case, referred to section 63 of the Indian Succession Act and laid down the requirements of section 63 of the Indian Succession Act as under:-

"(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction,

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the

testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

13. The defendants rely upon the will dated 28.9.1979.

Though Mr. Raghavachari, learned counsel would contend that there are no suspicious circumstances surrounding the execution of the will, however, the onus is still on the propounder of the will. In *SUSHILA DEVI v. KRISHNA KUMAR* (AIR 1971 SC 2236) the Supreme Court held that under section 63 of the Indian Succession Act, the mode of proving a will does not ordinarily differ from that of proving any other document and yet, the onus is still on the propounder and in the absence of suspicious circumstances surrounding the execution of will, the proof of testamentary capacity and signature of the testator as required by the law may be sufficient to discharge the onus. The Supreme Court also held that where there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will can be accepted as genuine.

14. In the instant case, the fourth defendant has examined herself as D.W.1, but she was not present at the time of execution of the will dated 28.9.1979 as she has admitted in her evidence that she was not present at the time of execution of the will. She has admitted that her father-in-law Muthusami Pillai had given her the will after one week from the date of execution of the will. The evidence of D.W.1 was referred to by Mr.S.V.Jayaraman, learned senior counsel for the appellants for the purpose of showing the physical condition of Muthusami Pillai and the cordial relationship between Muthusami Pillai and the members of the family in the year 1972 when the earlier will dated 15.3.1972 was executed, which we will deal with later. Her evidence is not of much help in considering the question whether the attestors have attested the will dated 28.9.1979. The evidence of Saroja, the first plaintiff, who has herself examined as P.W.1 is also not helpful to decide the question of attestation of the will of Muthusami Pillai dated 28.9.1979 as admittedly she was not present at the time of execution of the will.

15. As far as the attesting witnesses are concerned, one Kumarappa Gounder (D.W.2) has not supported the case of the defendants. Though he admitted his signature in the will, his evidence was that the first defendant Chennimalai asked for his signature as witness on behalf of the first defendant. He also stated, 'it is incorrect to state that Muthusami Pillai executed the will and affixed his signature before us and we have affixed our signatures in that'. He also stated that he did not know that Muthusami Pillai affixed his left thumb impression in each and every page of the will. In other words, his evidence is that he has not attested the will. The other witness, Thulasimani (D.W.3) has turned hostile and he has stated that he has not attested the will. As against the evidence of two attesting witnesses, the defendants rely upon the evidence of the scribe, Nagaraj (D.W.5). He has stated that Muthusami Pillai affixed his thumb impression in the will in the presence of attesting witnesses and then, the attesting witnesses

signed the will which was seen by Muthusami Pillai also. The other witness in support of the attestation of the will is the first defendant, Chennimalai (D.W.6). He has stated in his evidence that his grandfather affixed his thumb impression in the will which was seen by both the attesting witnesses and the will was also signed by the attesting witnesses in the presence of his grandfather who saw them attesting the document and after that, the scribe put his signature. In other words, there is conflicting evidence on this point between the attesting witnesses on one hand and the scribe and D. W.6 on the other hand. But, there is one neutral evidence, namely, the evidence of D.W.4. He is the Joint Sub-Registrar of Assurance, Erode and he has, in his evidence, deposed that both the attesting witnesses have identified Muthusami Pillai and signed on the backside of the first page of the will as identifying witnesses when the will was presented for registration. In his evidence in two places he has stated that Muthusami Pillai has admitted that the will was executed by him and then, he has affixed his thumb impression when the will was presented to him for registration of the will. He has also stated that he has put a specific question to him (Muthusami Pillai) whether it was the will of Muthusami Pillai for which Muthusami Pillai gave an affirmative answer. He has also stated that the will was read over to him and only after he gave the affirmative answer that it was his will, his thumb impression was obtained for the purpose of registration of the will. It is also relevant to mention here that Kumarappa Gounder and Thulasimani have admitted their signatures found in the will both as attesting witnesses and identifying witnesses in the will.

16. It is in the light of the facts as set out earlier and the conflicting evidence regarding attestation of the will by two witnesses who denied the attestation and the evidence of the scribe, D.W.5 and the first defendant (D.W.6), the question has to be considered whether there was valid attestation of the will. The submission of Mr.S.V.Jayaraman, learned senior counsel is that the testator did not sign the will dated 28.9.1979, but only his thumb impression is found. He referred to the evidence of D.W.6 wherein he has stated that the testator, Muthusami Pillai could read and write and he used to sign the document. He also referred to the evidence of the scribe, D.W.5 wherein he has stated that the testator informed him that he could read and write. He referred to the copy of the earlier will dated 15.3.1972 (Ex.A-3) and submitted that in that will Muthusami Pillai had signed. He referred to the written statement filed wherein the defendants have admitted that Muthusami Pillai was hale and healthy and he was very active till his death. He referred to the evidence of the fourth defendant (D.W.1) wherein she has stated that Muthusami Pillai was personally cultivating his lands and he was hale and healthy. He also referred to the evidence of the first defendant (D.W.6) wherein he has deposed regarding the sound physical condition of the testator and submitted that when the evidence is that the testator was in sound state of health, the fact that his thumb impression was obtained in the will and the Sub-Registrar of Assurance went to the house of first defendant for the purpose of registration of the will of Muthusami Pillai would constitute suspicious circumstances surrounding the execution of the will dated 28.9.1979.

17. Though Mr.V.Raghavachari, learned counsel referred to the evidence of the first plaintiff (P.W.1) regarding the physical condition of

the testator, there is no independent witness examined to corroborate the statement made by the first plaintiff. As far as the question of affixing thumb impression on the will dated 28.9.1979 is concerned, the testator himself has stated in the will that though he knew how to sign his signature, he has affixed his thumb impression as his hands were shaky. We are of the view that when the testator himself has stated that due to old age, his hands were shaky and he did not sign the document and affixed his thumb impression, the statement must be given some weight, particularly when the independent witness, the Sub-Registrar of Assurance (D.W.4) has stated that the testator has affixed his thumb impression at the time when the document was presented for registration in his presence. He has also stated that the testator himself admitted that it was his will. There is nothing to disbelieve the evidence of the independent witness, namely, the SubRegistrar of Assurance and he has also stated that at the request of Muthusami Pillai, the testator, the Sub-Registrar went to the residence of the first defendant for the purpose of registration of the document and Muthusami Pillai affixed his thumb impression at the time of registration of the will admitting the execution of the will.`

18. It is also relevant to mention here that the evidence of SubRegistrar of Assurance also shows that the identity of Muthusami Pillai was established by the attesting witnesses and after identifying Muthusami Pillai, the two attesting witnesses have signed on the reverse side of first page of the will. Further, the evidence of Kumarappa Gounder is that he has admitted his signature found as attesting witness as well as identifying witness, but his statement that he was not present at the time of registration of the document is unbelievable, when the evidence of Sub-Registrar of Assurance, a Government Officer, who performed the act of registration shows that both the attesting witnesses were present at the time of registration of the will and it has a great evidentiary value and considerable weight should be attached to his evidence rather than the evidence of D.Ws.2 and 3. Though the first defendant (D.W.6) has stated that there was no enmity between them and the two witnesses, D.Ws.2 and 3 (Thulasimani and Kumarappa Gounder), the evidence of D.Ws.2 and 3 shows that they have supported the case of the plaintiff.

19. The submission of Mr.S.V.Jayaraman, learned senior counsel is that there was no change in the circumstances after the execution of the 1972 will and there are no reasons to bequeath a portion of the properties in favour of the fourth defendant. He referred to the evidence of D.W.1 wherein she has stated that even in the year 1972 when the earlier will was written, the relationship between the testator and her was cordial, and submitted that after the death of his eldest son, Chinnappa Pillai which, according to the evidence, took place 24 years prior to the institution of the suit, that is, somewhere in 1962, the testator was taken care of by the fourth defendant. He also referred to the evidence of D.W.6 where he has stated that after the death of his grandmother, his mother (4th defendant) was taking care of the testator. He therefore submitted that there are no reasons for the testator to revoke the 1972 will in the year 1979 as even in 1972 when the earlier will was executed, the testator was looked after by the fourth defendant and their relationship was also cordial.

20. We are unable to accept the said submission for two

reasons. Admittedly, the marriage of one of the granddaughters of the testator, one of the beneficiaries, took place in the year 1978 and secondly, there is evidence to the effect that till 1976 the testator's elder sister was taking care of him and after that, the fourth defendant was taking care of the testator. Therefore there are certain events that had occurred after the execution of the 1972 will which would have some impact on the mode of distribution of properties; namely, the marriage of one of the plaintiffs and the death of elder sister of the testator and those circumstances would dispel the suspicious circumstances pointed out by the learned senior counsel for the appellants. Apart from that, the reason for the revocation of the will dated 15.3.1972 naturally would be the change in the mind of the testator and unless the reasons are specifically incorporated in the subsequent will, it is not possible to delve deep into the mind of the testator to find out the reasons for the revocation of the earlier will. Though the relationship might have been cordial since 1972, there is nothing which precludes the testator from changing his mind as the nature of the document is one which is liable to be revoked during the lifetime of the testator and the fact of revocation of the earlier will, by itself, would not be sufficient to discard the subsequent will.

21. Mr.S.V.Jayaraman, learned senior counsel also submitted that the evidence of D.W.1 clearly shows that the eldest son of Muthusami Pillai died in the year 1962 and the fourth defendant was maintaining her father-in-law for nearly 10 years and when the earlier will was executed by Muthusami Pillai in 1972, there was no provision made in favour of the fourth defendant and thereafter, there was no change in the circumstances and there are no reasons for Muthusami Pillai to make bequest in favour of his daughter-in-law after a period of seven years. We have already held that certain changes had occurred in the family which probably might have necessitated the testator to change his mind to provide for his daughter-in-law and that would not constitute a suspicious circumstance.

22. Mr.S.V.Jayaraman, learned senior counsel also submitted that D.W.6 has taken prominent part in the execution of the 1979 will. He referred to the evidence of D.W.6 and submitted that the evidence clearly shows that D.W.6 has taken prominent part in the execution of the 1979 will as the will was written in his house and he was present at the time of the alleged execution of the 1979 will and he (D.W.6) has submitted an application in the office of the Sub-Registrar requesting the Sub-Registrar to be present in his residence for registration and he took the Sub-Registrar to his house and he was present at the time of registration of the document also. He also referred to the evidence of D.W.6 where he has admitted that he was present in his house during the entire day when the 1979 will was written. There is no doubt that the first defendant (D.W.6) has taken some active part in the execution of the will as his evidence clearly shows that he has taken prominent part in the execution of the will. However, the 1979 will cannot be discarded on that ground as under the will one of the properties of the testator was given to his daughter in law and other properties were bequeathed in favour of his grandchildren as was done in the will dated 15.3.1972. By the 1979 will the property that fell to the share of the first defendant is much less than the share under the earlier will and further it cannot be

assumed that the properties bequeathed in favour of his mother would, in turn, be given to him by his mother. Therefore, it cannot be said that since the first defendant played a prominent part in the execution and registration of the 1979 will, it must be held that the will was executed under suspicious circumstances.

23. Mr.S.V.Jayaraman, learned senior counsel further submitted that the attestors did not support the 1979 will and the execution of the 1979 will has not been proved and the registration of the will would not prove the execution of the will. There is no difficulty in accepting the submission of Mr.S.V.Jayaraman, learned senior counsel that the registration, by itself, would not prove the execution of the will, but there are other evidence available to show that the will of Muthusami Pillai has been attested by the two witnesses. We have already held that the question whether the defendants have proved the execution of the will has to be considered in the light of the evidence of other witnesses examined by the defendants as both the attesting witnesses have denied the execution of the document. As far as this part of the question is concerned, we have already referred to the evidence of the scribe as well as the evidence of the first defendant (D.W.6) wherein they have stated that Muthusami Pillai executed the will in the presence of attesting witnesses and the attesting witnesses also signed the deed as attesting witnesses in their presence. The question whether the evidence given by the witnesses who are said to have attested the document can be accepted or the evidence of the scribe as well as the first defendant (D.W.6) can be given preference would depend upon the consideration of the neutral evidence of SubRegistrar of Assurance. The Sub-Registrar of Assurance, in more than one place, has stated that Muthusami Pillai has admitted the execution of the will and then, he affixed his thumb impression when the document was presented for registration. It is his evidence that he (SubRegistrar) also questioned Muthusami Pillai whether he has written the will for which Muthusami Pillai has given an affirmative answer and only after Muthusami Pillai has affirmed that it was his will, his thumb impression was obtained. It is also relevant to mention here that both D.Ws.5 and 6 have stated that the will was executed in the morning and then, an application was made to the Sub-Registrar to come to the house of D.W.6 for registration and the registration took place in the evening. The evidence of the SubRegistrar is clinching to the effect as to when the will was presented for registration as it was a complete document. His evidence shows that Muthusami Pillai admitted the execution of the document and at the time of registration, two attesting witnesses were there. The effect of admission made by Muthusami Pillai before the Sub-Registrar is that he confirmed his thumb impression found in the will and the signatures of attesting witnesses found in the will. In our view, the evidence of Sub-Registrar corroborates the evidence of D.Ws.5 and 6 which shows that there is proper attestation of the will of Muthusami Pillai.

24. Mr.S.V.Jayaraman, learned senior counsel also contended that the evidence of scribe has to be ignored as a whole as he was not able to say the particulars regarding the house where the will was registered and he has also deposed that he was not in a position to say who has written the application to the Sub-Registrar requesting him to be present in the house of

the first defendant for registration and he was also not able to inform who has presented the application before the Sub-Registrar requesting him to come to the house of first defendant for the purpose of registration. In this context, he also referred to the evidence of D.W.6 wherein he has stated that only the scribe has written the application. He therefore submitted that the evidence of the scribe is unreliable. The fact that the scribe was not able to give the full details regarding the place in which the will was written and not able to furnish certain minor details is not sufficient to discard his whole evidence. Further, the will was written in the year 1979 and the deposition was given in the year 1986 and it is quite natural that the scribe may not be able to remember the complete details of the place where the will was written and the mere fact that there are some minor discrepancies in the evidence of D.Ws.5 and 6 is not material and sufficient to completely reject the evidence of D.W.5 as his evidence is clear on the essential part of the execution of the will. He was also cross-examined, but nothing was elicited during the cross-examination to erode the evidentiary value of the scribe.

25. Further, we are of the view that the evidence of D.Ws.2 and 3, attesting witnesses, are not trustworthy as they have gone to the extent of deposing that they were not present at the time of registration, when the Sub-Registrar has stated that the two attesting witnesses were present at the time of registration and identified Muthusami Pillai and then their signatures were obtained in the deed. Though D.Ws.2 and 3 did not support the attestation of the will, that portion of their evidence admitting their signatures as attesting witnesses can be relied on as it is well-settled that their entire evidence need not be rejected. Here, the signatures of the attesting witnesses were proved. The signature of the testator was identified by the D. Ws.5 and 6 and their evidence in this respect is corroborated in material particulars by an independent witness. It is no doubt true that the evidence of the Sub-Registrar can be relied upon to show that the will was duly registered. We are of the view that though the evidence of attesting witnesses is not reliable, but there are other evidence to show that the will was duly executed and there is nothing improper to rely upon the evidence of other two witnesses, namely, D.Ws.5 and 6 who spoke about the signature of the testator in the will, supported by the evidence of an independent witness who received the confirmation from the testator that it was his will and admitted the same to be his will when he presented the said document for registration. On the facts of the case, we find that the witnesses have stated that the will contains the signatures of the attestors and the identity of the testator is also established by the evidence of SubRegistrar. The fact of attestation is proved by the evidence of SubRegistrar as well as the evidence of the scribe and D.W.6. It is not a case where the attestors have signed the will for any other purpose. We reject the evidence of the attesting witnesses, D.Ws.2 and 3 on the ground that they are not trustworthy. Hence, in these circumstances, we hold that the defendants have proved the execution of the will dated 28.9.1979.

26. Further, the Supreme Court in SUSHILA DEVI v. KRISHNA KUMAR (AIR 1972 SC 2236) has held that in the absence of suspicious circumstances surrounding the execution of the will, the proof of testamentary capacity and the signature of the testator as required by the law may be

sufficient to discharge the onus. Here, admittedly, there is no doubt about the testamentary capacity of the testator and there are evidence from more than one witness that the testator had sound disposing state of mind at the time of execution of the will. The evidence of the independent witness, viz., the Sub-registrar is also to the effect that the testator was identified by the attesting witnesses and the thumb impression of Muthusami Pillai was also not questioned. There are no suspicious circumstances surrounding the execution of the will as the fourth defendant was taking care of the testator for a quite long period after the death of her husband and the grandsons and granddaughters have been provided for in the will itself and there is nothing unnatural in bequeathing a portion of the property by the testator to the fourth defendant. In this view of the matter, we hold that the trial Court was correct in holding that the will dated 2 8.9.1979 (Ex.B-6) is a genuine and valid will of Muthusami Pillai.

27. Mr.Raghavachari, learned counsel also referred to the sale deeds dated 28.10.1991 and 24.8.1994 executed by the plaintiffs in favour of third parties and submitted that in those sale deeds the plaintiffs have referred to the will dated 28.9.1979 and claimed rights under the said will. In our view, the statement made in the two sale deeds cannot be taken advantage of by the defendants as the sale deeds were executed during the pendency of the appeal and in both the sale deeds there is a reference to the decree in O.S.No.930 of 1985 which is the subject matter of appeal before this Court. One other submission of Mr.V.Raghavachari, learned counsel for the respondents is that the suit for partition has to fail as the plaintiffs have not proved the will dated 15.3.1972. This contention is liable to be rejected on the ground that we uphold the validity and genuineness of the subsequent will dated 28.9.1979 and the contention lacks substance. Further, the fourth defendant Marayee ammal, in the suit for partition, has admitted that Muthusami Pillai had executed a will dated 15.3.1972 bequeathing all his properties equally among the children of Chinnappa Pillai and Ayyasami Pillai. Further, the evidence of D.w.6 is also to the effect that there is no dispute about the 1972 will. Hence, the objections raised regarding the 1972 wilkl and the maintainability of the suit are rejected.

28. We are therefore of the view that the learned trial Judge was correct in holding that all the suit properties except A-schedule property, namely, 96 cents, are liable for partition in terms of the will dated 28.9.1979 and was also correct in passing the preliminary decree for partition. The result is we confirm the judgment and decrees of the trial Court in both the suits and both the appeals stand dismissed. In the circumstances, there will be no order as to costs.

Index: Yes

Website: Yes

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To

1. The Subordinate Judge, Erode.

2. The Section Officer, V.R.Section,

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